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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7004

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIREMAN'S FUND INSURANCE COMPANY,

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DEKALB COUNTY, GEORGIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Fireman's Fund Insurance Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting en banc, entered in this case on August 25, 1976, which judgment reversed a portion of the original Fifth Circuit panel decision and which judgment also affirmed the entire judgment entered by the United States District Court for the Northern District of Georgia dismissing respondent DeKalb County as a party on grounds of sovereign immunity.[1]

OPINIONS BELOW

The en banc opinion of the Fifth Circuit Court of Appeals, entered after rehearing, is reported at 538

[1] Three other petitions have been or will be filed relating to the decision below. Petitioner suggests that it would be appropriate to consolidate all of the petitions for decision.

F.2d 643 and is reprinted in Appendix A, *infra*, p. 1a. The original panel decision of the Fifth Circuit Court of Appeals, and the order granting rehearing en banc, are reported at 526 F.2d 679 and are reprinted in Appendix B, *infra*, p. 17a. The opinion of the District Court (R. 224, A. 117)[2] is not reported, but is reprinted in Appendix C, *infra*, p. 35a.

JURISDICTION

The original panel decision of the Fifth Circuit Court of Appeals was entered on January 30, 1976, and respondent DeKalb County's timely petition for rehearing en banc was granted on April 5, 1976. (Appendix B, *infra*.) The en banc decision of the Fifth Circuit Court of Appeals was entered on August 25, 1976. (Appendix A, *infra*.) The judgment on rehearing en banc of the Fifth Circuit Court of Appeals was entered on August 25, 1976 and is reprinted in Appendix D, *infra*, p. 55a. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Must a Federal Court in a diversity of citizenship case ordinarily subject to the holding of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), be governed by federal common law in determining whether private litigants have standing as third party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the

[2] "R" refers to the Record filed in the Fifth Circuit and "A" refers to the Appendix filed in the Fifth Circuit.

county airport, and, if federal common law does apply to such issue, should not the Federal Court in deciding such issue follow the federal common law rulings of other Federal Courts (including Circuit Courts of Appeals) on the question?

2. If a Federal Court in a diversity of citizenship case should not apply federal common law in determining whether private litigants have standing as third party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the county airport, does not the holding of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), require the Federal Court to follow and apply the substantive law clearly and on several occasions announced by the highest appellate courts of the forum state with respect to the question at issue, rather than the Federal Court's concept of the law prevailing in other jurisdictions, particularly when the substantive law of the forum state would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in such safety covenants and in federal legislation concerning aviation and aid to airports?

3. Is there an overriding federal interest in the regulation of aeronautical interstate commerce that preempts at least to a limited degree state laws concerning local sovereign immunity, so that a county which has entered into Grant Agreements with the F.A.A. under the aegis of the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*) and has

received significant federal funding of county airport improvements, is precluded from asserting sovereign immunity as a bar to suits brought by aeronautical users of the county airport, as third party beneficiaries, for negligent breach by the county of safety covenants contained in the Grant Agreements, when such safety covenants ex facie are intended for the benefit of aeronautical users of the airport, and particularly when the denial of sovereign immunity to the county under such circumstances would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in the federal regulation of aviation and would also result in nationwide uniform interpretations of federal aviation legislation?

4. As both municipalities and counties in Georgia have the identical authority to engage in the same proprietary function of owning and operating public airports, and as both municipalities and counties are eligible on an equal basis for Grant Agreements and federal funds under the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*), and as under Georgia law a governmental entity in the form of a municipality has no sovereign immunity from suits arising from municipal ownership and operation of public airports, and as there are no rational or legitimate distinctions and differences between the proprietary function of a municipality in owning and operating a public airport and the proprietary function of a county in owning and operating a public airport, do the decisions below, which provide a county with absolute sovereign immunity, serve to create an irrational, arbitrary and unreasonable judicial classification of the types of local governmental entities that can be sued for wrongs committed during the course of

operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution, or alternatively, under the facts of and as applied to this case, does Georgia Code Section 23-1502 in and of itself constitute an irrational, arbitrary and unreasonable legislative classification of the types of local governmental entities that can be sued for wrongs committed during the course of operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution?

STATUTES INVOLVED

The "Rules of Decision Act," 28 U.S.C. § 1652, is relevant to the questions presented by this petition. That Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

* * *

The following portions of the Airport and Airway Development Act, 49 U.S.C. §§ 1701, *et seq.*, are also involved:

"§ 1701. Congressional declaration of policy.

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the

demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than $250,000,000.

"That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be $2,500,000,000."

"§ 1711. Definitions.

"As used in this subchapter—

* * *

"(3) 'Airport hazard' means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft."

"§ 1713. Planning grants.

"(a) In order to promote the effective location and development of airports and the development of an adequate national airport system plan, the Secretary may make grants of funds to planning agencies for airport system planning, and to public agencies for airport master planning."

"§ 1714. Airport and airway development program.

"(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with

sponsors in aggregate amounts not less than the following: . . ."

"§ 1716. Projection applications for airport development.

"(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches."

* * *

"(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

"(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

* * *

"(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met."

"§ 1718. Project sponsorship requirements; compliance; contracts between Secretary and

public agencies; air traffic control activities; relief of sponsors.

"As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

"(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

"(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

"(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

"(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

* * *

"(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection; . . ."

* * *

The following portions of the Georgia Uniform Airports Act, Georgia Code Sections 11-201, *et seq.*, are relevant here:

"11-201. Municipalities, etc., may acquire airports.

"Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties or other political subdivisions. . . ."

"11-205. Authority to equip, improve, establish fees and charges, lease, etc.

"Counties, municipalities, or other political subdivisions which have established or may hereafter establish airports or landing fields, or which acquire, lease, or set apart real property for such purpose or purposes, are hereby authorized:

"(a) To construct, equip, improve, maintain, and operate the same, or to vest authority for the construction, equipment, improvement, maintenance, and operation thereof, in an officer, board, or body of such political subdivisions. The expense of such construction, equipment, improvement, maintenance, and operation shall be a responsibility of said political subdivision.

"(b) Subject to existing contracts, to adopt regulations and establish charges, fees, and tolls for the use of such airports or landing fields, fix penalties for the violation of said regulations, and establish liens to enforce payment of said charges, fees, and tolls.

"(c) To lease such airports or landing fields to private parties for operation or to lease or assign to private parties for operation, space, area, improvements, and equipment on such airports or landing fields: Provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof."

"11-402. Definitions.

"As used in this Chapter, unless the context otherwise requires:

* * *

"(2) 'Airport hazard' means any overhead power line which interferes with radio communication between a publicly-owned aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off."

"11-403. Airport hazards not in public interest.

"It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare."

* * *

Georgia Code Section 3-108, which authorizes a breach of contract suit by a third party beneficiary, provides:

"3-108. Parties to actions on contracts.

"As a general rule, the action on a contract, whether express or implied, or whether by parol or

under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

* * *

Georgia Code Section 23-1502, which the courts below construed as supplying counties with carte blanche sovereign immunity in all cases and under all circumstances, provides:

"23-1502. When country liable to suit.—

"A county is not liable to suit for any cause of action unless made so by statute."

STATEMENT OF THE CASE

On February 26, 1973, after receiving clearances from the F.A.A.-operated control tower, a Learjet Model 24 aircraft, F.A.A. Registration No. N-454RN, owned by Southeast Machinery, Inc. and operated by Machinery Buyers Corp., made an IFR takeoff from Runway 20L at DeKalb-Peachtree Airport, Atlanta, Georgia. Immediately after becoming airborne, and while within the boundaries of the airport and at an altitude of approximately 400 feet, the jet engines of said aircraft ingested a large number of starlings or similar birds, resulting in a sudden loss of power in both engines and the crash and total destruction of said aircraft and the death of all seven persons aboard the aircraft. (R. 8-9)

After the crash the remains of many dead birds were found at or near the departure end of Runway 20L, and

bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines. Also, immediately prior to and after the crash large flocks of birds were located in and about the Airport boundaries and the adjacent garbage dump operated by DeKalb County. (R. 12) The sole physical cause of the crash was loss of engine power in both jet engines, resulting directly and solely from the ingestion of birds in the engines. (R. 9)

Petitioner Fireman's Fund Insurance Company, which provided hull insurance to Southeast Machinery with respect to Learjet N-454RN, paid its insured for the hull loss and then filed this suit against respondent DeKalb County and the United States of America to recover for the $549,432.00 hull subrogation interest. (R. 12-13) Jurisdiction over DeKalb County was based on diversity of citizenship and jurisdiction over the U.S.A. was based on the Federal Tort Claims Act. (R. 8)

As amended, the complaint against DeKalb County alleged three principal claims: negligence; maintenance of public and private nuisance; and breach of certain grant agreements entered into between DeKalb County and the F.A.A. concerning development of the county-owned and operated airport. (R. 5-36)

In this case and in four other cases resulting from the catastrophe the District Court granted motions to dismiss filed by DeKalb County, on the theory that the concept of sovereign immunity barred any claims against DeKalb County. (Appendix C, *infra*, p. 35a.)

Petitioner (and plaintiffs in the other four cases) appealed to the Fifth Circuit Court of Appeals from

the order dismissing respondent DeKalb County, and on January 30, 1976 the initial Fifth Circuit panel of Circuit Judges Godbold, Dyer and Morgan issued a decision reversing the District Court dismissal order. (Appendix B, *infra*, p. 17a.) This initial Fifth Circuit decision held that DeKalb County was entitled to sovereign immunity as to petitioner's negligence and nuisance claims, but that sovereign immunity did not bar the breach of contract claim based upon petitioner's status as a third party beneficiary of the savety covenants imposed upon DeKalb County by the F.A.A. in certain Grant Agreements. Circuit Judge Dyer dissented from the portion of the decision holding that petitioner could sue for breach of contract. The basis for his dissent was that federal common law applied to the breach of contract claim and that under federal common law petitioner lacked standing to sue as a third party beneficiary.

Thereafter, respondent DeKalb County moved for rehearing en banc and on April 5, 1976 rehearing en banc was granted. (Appendix B, *infra*, p. 17a.) On August 25, 1976, the Fifth Circuit sitting en banc, in an eight to five decision, adopted Circuit Judge Dyer's earlier dissent and in effect ruled that DeKalb County was entitled to sovereign immunity as to *all* of petitioner's claims, including the breach of contract claim. (Appendix A, *infra*, p. 1a.) The five dissenting members of the en banc Court were Chief Judge Brown and Circuit Judges Goldberg, Ainsworth, Godbold and Morgan, and they urged that petitioner did have standing as a third party beneficiary to sue for DeKalb County's breach of the Grant Agreements. Four of the dissenting judges of the en banc court also argued that federal common law did not apply to the case.

Petitioner seeks a writ of certiorari from this Honorable Court to review the eight to five en banc rehearing decision of the Fifth Circuit.

As the decision in question was entered with respect to respondent DeKalb County's motion to dismiss, it is necessary for this Court generally to be aware of the relevant allegations of petitioner's complaint, which allegations are set forth below.

Prior to the crash, DeKalb County had actual knowledge that birds could be ingested into jet engines, and that jet engine bird ingestion could cause an engine failure and crash. DeKalb County also had actual knowledge that a dangerous bird hazard, bird problem and bird-attracting garbage dump existed at the Airport. (R. 12)

Pursuant to the authority and directions of Congress, the F.A.A. prior to the crash in question had issued Advisory Circular No. 150/5200-3A, dated March 2, 1972, entitled "Bird Hazards to Aircraft," in which the F.A.A. stated in part as follows:

> "Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude." (R. 18)

To cope with such bird hazards, the Advisory Circular states that the F.A.A. operates as follows:

> "F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport manage-

> ment for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roost on runways." (R. 18)

Public knowledge of the hazards of birds to aircraft has existed at least since the 1940's, when the F.A.A. published a report containing detailed statistics on the collision of aircraft with birds, which report was admitted into evidence in *Rapp v. Eastern Air Lines, Inc., U.S.A., et al.*, 264 F.Supp. 673 (E.D. Pa. 1967), and which report included 1946 statistics on bird strikes by aircraft, there being more than one such strike per day during this early aviation period. (R. 20)

DeKalb-Peachtree Airport is located in DeKalb County on land owned by the County, and the Airport is owned, operated, managed and maintained by the County. The Airport has paved runways, hangars, servicing and parking facilities, a control tower with radio facilities, an instrument landing system control center, and access to other radio and navigational aids. The Airport is operated by the County for the public welfare and benefit of all citizens and is subject to the jurisdiction of the F.A.A. (R. 21)

DeKalb County acquired the Airport by way of quitclaim deed from the United States General Services Administration in 1960. Since 1966 DeKalb County has utilized the Airport site for dumping raw garbage. (R. 21) Employees of DeKalb County at the Airport have observed and reported a significant increase in the number of birds at the Airport following the utilization of the Airport site for raw garbage disposal. (R. 21)

The untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by DeKalb County

on the Airport created a large area constituting an attraction to birds and causing huge flocks of birds to congregate about the Airport, the runways, ends of runways and other areas within the Airport boundaries. The attractiveness of the open garbage dump to birds was increased by the failure of DeKalb County to remove trees, undergrowth and high grass from the area of the open garbage dump and along the runways, which foliage provided roosting, nesting and basking areas for the large flocks of birds attracted to the garbage dump. The birds at times remained, walked and ran upon said runways and adjacent grass areas at the sides and ends of the runways, and congregated in the numerous trees on and about the Airport area. The birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land or fly near said Airport. The flocks of birds at the Airport constituted a continuous hazard to the safety of aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of the Airport. (R. 22)

Beginning in June, 1962, the Federal Government entered into six Grant Agreements with DeKalb County, pursuant to which at least $1,025,224.06 was paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport. (R. 23) Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the F.A.A. graphically illustrating the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. Such use does not include an open garbage dump or

any other dumping ground for garbage. (R. 23)

Prior to the crash in question, the F.A.A. recognized that the existence of the open garbage dump at the Airport constituted an attraction to huge flocks of birds, and that such birds constituted a definite hazard for aircraft taking off and landing at the Airport. (R. 24) From March 9, 1970, to February 14, 1972, the F.A.A. communicated with DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the open garbage dump on the Airport site. In February, 1971, the F.A.A. was advised by DeKalb County that the dump would be closed by August, 1972, but DeKalb County did not close the dump and the hazard continued. (R. 24)

The Grant Agreements entered into between the F.A.A. and DeKalb County under the Airport and Airway Development Act imposed the following obligations on DeKalb County:

> "The Sponsor [DeKalb County] will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to approval of the F.A.A., which approval shall be evidenced by the signature of a duly authorized representative of the F.A.A. on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (R. 25)

As previously noted, the airport layout plan made no mention of an open garbage dump on the Airport. The

Grant Agreements also imposed the following specific covenants on the County:

> "These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, . . ."
>
> "The Sponsor will operate the Airport as such for the use and benefit of the public. . . . The Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public."
>
> "The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes."
>
> "In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land."
>
> " . . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."
>
> "Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict

> the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." (R. 25-26)

DeKalb County violated the Grant Agreement covenants by willfully permitting the existence of an open garbage dump and bird hazard on the Airport site and adjacent to Runway 20L. The covenants ex facie were intended for the benefit and safety of aeronautical users of the Airport, and petitioner's insureds were third party beneficiaries of said Grant Agreement covenants. Accordingly, DeKalb County is liable for breach of such Grant Agreement covenants. (R. 26)

By reason of the existence of the open garbage dump prior to and on February 26, 1973, the operation of the Airport by DeKalb County constituted a public and private nuisance and a hazard to public safety, and the maintenance of the open garbage dump at the Airport constituted an airport hazard as defined in 49 U.S.C. § 1711, and was a violation of 49 U.S.C. § 1718(3). (R. 26-27)

The reckless nature of the negligence and dereliction of duties of DeKalb County is exemplified by the fact that prior to the fatal crash in question, DeKalb County had received notices of several airplane bird-strike and near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents DeKalb County failed to take any action at all to prevent a recurrence of such incidents. (R. 32)

The Airport is not owned, operated, managed and maintained by DeKalb County as a governmental function or enterprise, but, instead, is owned, operated, maintained and managed by DeKalb County as a pro-

prietary or ministerial function or enterprise. DeKalb County leases substantial portions of the Airport to private companies engaged in commercial operations for profit; some of such leases are for fixed rental amounts plus a percentage of the revenues or income derived by the tenants from their commercial operations; the revenues thus obtained by DeKalb County are not insignificant, but are substantial; and the Airport is owned, operated, managed and maintained by DeKalb County primarily as a source of revenue for the County. In effect, with respect to the ownership, operation, management and maintenance of the Airport, DeKalb County acts as a private landlord and not as a governmental entity. (R. 32-33)

Prior to the accident, DeKalb County purchased a liability insurance policy providing bodily injury liability insurance and property damage liability insurance with respect to the ownership, operation, management and maintanance of the Airport, and such insurance applies to petitioner's claims. Such insurance contains a "Waiver of Governmental Immunity" rider which provides as follows:

> "It is agreed that the Company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions." (R. 33, 130)

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Existing Conflict As To Whether Federal Common Law or State Law Determines The Standing of Private Litigants As Third Party Beneficiaries To Sue Non-Federal Entities For Breach of Grant Agreements Entered Into With The Federal Government.

The first reason why the petition for a writ of certiorari should be granted is that this Court should resolve the sharp conflict existing in the lower federal courts as to whether federal common law or *Erie*-Interpreted forum state law determines the standing *vel non* of private litigants, as third party beneficiaries, to sue non-federal entities for breach of contracts entered into between such non-federal entities and the Federal government.

The existence of this conflict is apparent from the en banc decision below.

The majority of the en banc Court held that in this diversity of citizenship case federal common law controlled the question of whether petitioner had standing as a third party beneficiary to sue for breach of the Grant Agreement covenants. This opinion was based upon the following considerations: the United States was a party to the contract; the contract was entered into pursuant to authority conferred by a federal statute; and there was a need for "uniformity of decision" in construing "federal" contracts. (See Appendix B, *infra*, p. 17a.)

Four of the five Circuit Judges who dissented from the en banc decision argued that federal common law was not applicable, that *Erie* required application of

the substantive law of the forum state, and that under Georgia law petitioner clearly had standing to sue as a third party beneficiary. As support for their position, such dissenting Circuit Judges pointed out that although the United States was a party to the contract and was also a party to the litigation, the third party beneficiary controversy did not involve the United States and did not have any impact on federal fiscal policy, and therefore there was no compelling need for uniformity of decision. For these reasons, such Circuit Judges felt that the third party beneficiary question presented a purely local controversy between non-federal parties, and that the mandate of *Erie* should be followed.

It may be observed from the decision below that both the dissenting Circuit Judges and the Circuit Judges comprising the en banc majority found support for their opposing positions in obviously conflicting Federal Court decisions.

A genuine and substantial controversy thus clearly exists as to when and under what circumstances federal common law, or *Erie*-interpreted state law, applies to determine the standing of non-federal litigants, as third party beneficiaries, to sue other non-federal litigants for breach of contracts made with the United States, and in view of the wide range of currently existing federal aid programs and related "federal" contracts, this controversy is not likely to subside. A definitive decision by this Court is needed to resolve this controversy and conflict of opinion.

II. The Decision Below Is Erroneous And Is In Irreconcilable Conflict With Both Federal Common Law And State Law.

The second reason why this petition for a writ of certiorari should be granted is that the decision below is erroneous and is in direct, head-on conflict with both federal common law and state law, *regardless of which law is applicable.*

Considering first the area of federal common law, in *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1971), the Ninth Circuit carefully studied the type of F.A.A. Grant Agreements involved here and statutory and contractual covenants similar to those relied upon by petitioner, and concluded that such covenants were in fact intended to confer a benefit upon third parties and that such third party beneficiaries had the requisite standing to sue for breach of the covenants, assuming any relevant administrative remedies had been exhausted. 415 F.2d 954-956.[3]

The Seventh Circuit Court of Appeals has also indicated that private, non-contracting parties "may qualify as intended beneficiaries" under the particular Act and type of F.A.A. Grant Agreements involved here. See *Luedtke v. County of Milwaukee,* 521 F.2d 387, 391 (7th Cir. 1975). *Cf.*, the District Court and Circuit Court decisions in *Town of New Windsor v. Ronan,* 481 F.2d 450 (2nd Cir. 1973), and 329 F.Supp. 1286 (S.D.N.Y. 1973).

And in the landmark airplane-bird ingestion case, *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673

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[3] There is no issue of exhaustion of administrative remedies in the case at bar.

(E.D. Pa. 1967), the District Court's judgment of tort liability in favor of private, non-contracting parties and against the defendant (who was a party to Grant Agreements) was based in large part upon the defendant's breach of duties and obligations imposed by F.A.A. Grant Agreements identical to the ones involved here.

The decision below is in irreconcilable conflict with the decisions in *City of Inglewood*, *Luedtke* and *Rapp*.

The decision below is also in direct conflict with other decisions of the Fifth Circuit Court of Appeals. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), it was held that black children were third party beneficiaries of anti-discrimination covenants contained in federal aid grant agreements between the local school board and H.E.W., and that such children had standing as third party beneficiaries to sue the local school board for breach of such covenants. And in *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961), the Fifth Circuit held that a private party should be allowed to maintain a tort-damage action against a Georgia county because the Federal Power Act and a license granted to the County under such Act imposed a duty on the County to protect the property of private third parties.

In concluding that petitioner lacked standing as a third party beneficiary to sue for breach of the Grant Agreement covenants, the Court below not only failed to recognize and follow the federal common law explicit in the cases discussed above, but applied the wrong test to determine whether plaintiff possessed standing as a third party beneficiary.

The Court below held that under federal common law the test of standing as a third party beneficiary was whether the "federal" contract itself clearly manifested an intent to compensate the third party in damages in the event of a breach. *This measure or test of standing was not distilled from decisions of this Court or from decisions of other Federal Courts.* Instead, this test of standing was derived from the forty-four year old First Restatement of Contracts, *and it is clearly an erroneous and inapplicable test.*

Under federal common law, the true measure of standing as a third party beneficiary is a three-pronged test: (1) does plaintiff's personal stake in the case satisfy the concrete adverseness required by Article III of the Constitution? (2) does plaintiff fall within the class of persons or zone of interests intended to be benefited or protected by the contractual or statutory provisions in question? and, (3) does the contract or statute in question preclude suit or judicial review? See *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 955 (9th Cir. 1971); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970); and *Barlow v. Collins*, 397 U.S. 159, 164-165 (1970).

Petitioner's claims herein clearly measure up to these three yardsticks. Petitioner's injury is not imaginary, but is real and immediate. And petitioner falls within the class of persons intended to be protected by the statutory and contractual covenants in question, as such covenants on their face are intended to protect, and provide for the safety of, "aeronautical users of the Airport."

Last, neither the Grant Agreements nor the Airport

and Airway Development Act, nor the legislative history of such Act, preclude petitioner's claims against DeKalb County. To the contrary, allowance of petitioner's claims can serve only to foster and enforce the United States' expressed concern for aviation safety and the public policy considerations inherent in the Act and Grant Agreements in question.

It is thus apparent that the decision below is erroneous and is in direct and irreconcilable conflict both with federal common law, with decisions from other Federal courts, and with the public policy considerations plainly expressed in the Act and F.A.A. Grant Agreements.

Turning now to state law, if federal common law does not govern the question of whether petitioner has standing as a third party beneficiary to sue for breach of the Grant Agreements covenants in question, then *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938), obviously dictates that the substantive law of the forum state must govern such question. Fortunately, Georgia law on the subject is not difficult to ascertain.

Georgia Code Section 3-108 provides: "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

In *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E.2d 245 (1912), the Georgia Supreme Court held that "the great weight of authority is to the effect that if the promise is made for the purpose of conferring a benefit on a person, though he be not a party to the contract, or furnish the consideration for the promise, he can bring suit upon it." To the same effect are *Holland v. Phillips*, 94 Ga.App. 361, 94 S.E.2d 503 (1956); *Smith*

v. Ledbetter Brothers, Inc., 111 Ga.App. 238, 141 S.E.2d 322 (1965); *M. R. Thomason & Associates v. Wilson*, 125 Ga.App. 658, 188 S.E.2d 805 (1972); and *State Construction Company v. Johnson*, 88 Ga.App. 651, 656, 77 S.E.2d 240 (1953).

The Georgia law regarding third party beneficiaries of contracts also applies to suits against counties. To demonstrate this point we need only refer to the full bench decision of the Georgia Supreme Court in *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966):

> "Counties are empowered to sue or be sued in any court. Code § 23-1501, but 'a county is not liable to suit for any cause of action unless made so by statute.' Code § 23-1502. However, an exception exists where a county breaches a contract it was authorized by law to undertake. . . . 'Whenever a county is made liable by statute for a demand, or is authorized by statute to contract, and in pursuance of such power does contract, *then an action will lie against it to enforce such liability, or to enforce any rights growing out of such contract*, although there is no statute expressly authorizing the bringing of an action for such purpose. . . . In other words, a county can always be sued upon any liability against it created by statute, or for breach of any valid contract which it is authorized by law to make.'
>
> " 'Liability to suit may be shown by indicating that the claim arises . . . as an incident in the performance of an undertaking by the county authorized by statute.' " *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966). (Emphasis added.)

See also *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (involving the very same airport and very same county involved in

this litigation); *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973) (in which the Georgia Supreme Court upheld a death claim against a county based upon a tort arising out of breach of contractual commitments between the county and Georgia Power Company); and *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873, 877-878 (5th Cir. 1960), *cert. denied* 375 U.S. 942 (1961) (in which the Fifth Circuit held: "Here the County was under a duty imposed by the Federal Power Act to protect the Seaboard's property, and thus the Act created a tort liability.")

From the foregoing, it cannot be denied that if federal common law does not apply to the question at hand, then the decision below is plainly erroneous and in irreconcilable conflict both with the mandate of *Erie R.R. v. Tompkins* and with the decisions of the highest appellate courts of Georgia.

Summarizing, this Court should grant the requested writ of certiorari, because:

(a) If federal common law applies to the question under consideration, then the decision below is in irreconcilable conflict with the federal common law expressed in the decisions of other Federal Courts (including Circuit Courts of Appeal), and with the public policy inherent in the Act and Grant Agreements in question; and

(b) If state law applies to the question under consideration, then the decision below is in irreconcilable conflict with the mandate of *Erie R.R. v. Tompkins* and with the law of Georgia.

III. The Paramount And Overriding Interest Of The Federal Government In Regulating All Phases of Aeronautical Commerce Preempts At Least To A Limited Degree Local Laws Concerning Sovereign Immunity.

The third reason why this petition for a writ of certiorari should be granted is that the paramount and overriding interest and activity of the Federal Government in regulating *all* phases of aeronautical commerce preempts and precludes, under the particular circumstances here involved, any reliance upon local sovereign immunity laws by respondent DeKalb County. In essence, by voluntarily engaging in an area of commerce regulated by the Federal Government, and by voluntarily soliciting and accepting federal funds and entering in Grant Agreements with the Federal Government, DeKalb County has waived any sovereign immunity with respect to claims arising from the County's federally regulated aviation activities.

In *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964), this Court held that when the States granted Congress the power to regulate commerce the States surrendered any portion of their sovereignty that would stand in the way of such regulation (377 U.S. 191-192), and that the States also waived their traditional sovereign immunity with respect to claims arising from voluntary activity by the States in the federally regulated area of commerce. (377 U.S. 192-198.)

Specifically, in overruling the state agency's sovereign immunity defense to the F.E.L.A. tort suit brought by plaintiffs in the *Parden* case, this Court ruled:

> "Moreover, such a result [sustaining of the sovereign immunity defense] would bear the seeds

> of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation . . . In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." 377 U.S. 197-198.

Subsequent to this Court's ruling in *Parden* the Circuit Courts of Appeal have consistently overruled sovereign immunity defenses relied upon by state agencies engaged in various areas of activity regulated by Congress. *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) (by engaging in activity of paramount federal interest a state may waive its sovereign immunity, and whether such waiver has occurred is a question of federal law); *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied* 400 U.S. 829 (1970) (in the realm of interstate commerce congressional authority is supreme and overrides any state interest in sovereign immunity with respect to rights and remedies implicit in federal regulation); *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) (by seeking and obtaining admission into federally regulated area of interstate commerce, and by obtaining permission to build and operate bridge and tunnel across bay, state agency waived any

sovereign immunity to federal court suit for damage to ship which struck submerged light tower).

From even a quick glance at the aviation laws and regulations promulgated by the various branches of the Federal Government, it is clear that aviation or aeronautical commerce is an extensively and pervasively federally regulated area of commerce, and that such federal regulation preempts any conflicting regulation by the states. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). As is evident from the Airport and Airway Development Act and the Grant Agreements in question here, such federal regulation extends to and completely encompasses the activity of local state agencies in operating and maintaining airports.

DeKalb County was not required to seek and obtain ownership of and operating rights to the Airport in question from the General Services Administration. DeKalb County was not coerced into seeking and obtaining $1,025,224.06 in federal aid under the Airport and Airway Development Act. And DeKalb County was not forced into signing Grant Agreements with the F.A.A. and in subjecting itself to federal regulation of airport and aviation activities.

DeKalb County *voluntarily* sought and obtained admission into a federally regulated area of interstate commerce, and thereby *as a matter of federal law* waived its sovereign immunity to the extent of private claims involving rights and remedies implicit in the federal regulation. To rule otherwise would impede substantially the federally expressed concern for aviation safety (and elimination of airport hazards) *explicit* in the Act and Grant Agreements in question.

At this juncture, we wish to point out that the cases discussed in this portion of our petition clearly hold that the waiver of immunity applies to traditional *tort* suits, as well as to suits for breach of federally imposed duties (contractual or otherwise).

The decision below fails to apply the *federal law* discussed above; is in head-on conflict with the rulings of this Court and other Federal Courts concerning waiver of immunity; and if allowed to stand can serve only to burden interstate commerce and to thwart the explicit objectives of the Act and Grant Agreements in question.

For these reasons alone, this Court should allow review of the decision below.

IV. The Decision Below Has Resulted In An Unconstitutional Denial Of Equal Protection.

Under Georgia law DeKalb County's ownership and operation of the Airport is a proprietary—not governmental—activity or function. *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 854-55, 118 S.E.2d 234 (1960). Although Georgia *cities* are entitled to governmental immunity, it is clear that under Georgia law a *city* can be sued in tort for negligence resulting from the city's proprietary activity in owning and operating an airport. *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961); *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952).

The statutory authority for either a city or a county to engage in the proprietary activity of owning and operating an airport *is the same:* the Georgia Uniform Airport Act, Georgia Code Sections 11-201, *et seq.* And both cities and counties are eligible on an equal basis for federal aid under the Airport and Airway Develop-

ment Act. Last, a review of Georgia airport legislation and the Georgia cases cited above demonstrate that there are *no distinctions or differences* between the proprietary operation of an airport by a city and the proprietary operation of an airport by a county.

Thus, if Georgia Code Section 23-1502 is construed to bar petitioner's claims against DeKalb County, the result would be the creation of a scheme of classification that would allow suits against some local governmental entities for the negligent proprietary operation of airports but would prohibit identical suits against other local governmental entities for the identical negligent proprietary operation of identical airports. *This is precisely the effect of the decision by the Court below.*

There is no legitimate or rational basis or reason for a legislative or judicial scheme of classification that has the effect of allowing prosecution of the former type of suit but disallows prosecution of the latter type of suit, and such scheme of classification is patently unconstitutional as a denial of equal protection and due process. [The constitutional guarantees of equal protection and due process apply to judicial interpretations of statutes, as well as to legislative enactments. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).][4]

Any scheme of classification " . . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920). See also, *Levy v. Louisiana*,

[4] These constitutional arguments were presented to the Court below, but were disregarded. See petitioner's brief in advance of en banc hearing.

391 U.S. 68 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) (in which cases this Court struck down as unconstitutional state laws and rules that created arbitrary classes of persons who could maintain wrongful death actions).

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administrated by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

The constitutional infirmity in the scheme of classification contended for by DeKalb County and created by the decision of the Court below is revealed clearly by the fact that if the City of Decatur (the county seat), rather than DeKalb County, was the owner and operator of the Airport, the issue of sovereign immunity would not be involved in this case.

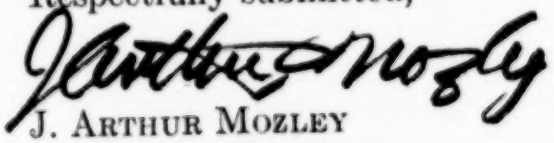
The right to have a claim adjudicated by a court and jury on a basis equal with others similarly situated is a fundamental right. The decision below has created an arbitrary and unconstutitional scheme of classification that deprives petitioner of such right. Such decision also imposes an unconstitutional burden on interstate commerce, in that injured interstate aeronautical travellers may or may not be afforded access to the courts of the land, dependent upon the totally fortuitous circumstance of whether the involved airport is owned by one type of local governmental entity rather than another.

A writ of certiorari should issue to correct these constitutional infirmities in the decision below.

CONCLUSION

For all of these reasons, petitioner asks that a writ of certiorari be issued and that this Honorable Court review and reverse the judgment of the court below.

Respectfully submitted,



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November 19, 1976

CERTIFICATE OF SERVICE

I, J. Arthur Mozley, attorney for Petitioner Fireman's Fund Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of November, 1976, I served three true copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the respondents and all parties, by depositing in a United States mailbox true copies of said petition, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

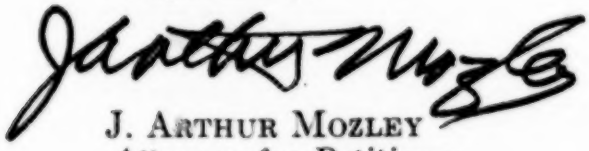
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Respectfully,



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Attorney for Petitioner

APPENDICES

APPENDIX A

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

U.S.A.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1976.

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, ___ U.S. ___, 96 S.Ct. 1971,

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* Because of illness Judge Wisdom did not participate in the hearing or the consideration of this case. Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, §1108(a), 49 U.S.C. §1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. §1110, *now enacted at* 49 U.S.C. §1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negli-

gence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance. The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the

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[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in diversity cases [3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and trans-

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[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

actions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of

[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

the United States[6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands.

Clearfiel Trust Co. v. United States, supra.
United States v. Standard Oil, supra.

In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . .
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> * * * * * *
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> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and

Wallis, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

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[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States*, *supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand

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Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third party beneficiary rights is equally compelling.

federal jurisdiction.[10] Therefore, whether we had held that Georgia law did or did not render the County liable on a third party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. This is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law Of Federal Courts* 250 (2d ed. 1970). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

II. Third Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third party beneficiaries. Judge Dyer cites the *Restatement (First) of Contracts*, §145

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[10] *E. g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

(1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States, supra,* at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine and that the seven cases cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case support our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third party beneficiaries under a contract between

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[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudson Company,* 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States,* 279 F.Supp. 548 (D. Mont. 1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.,* 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States,* 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third party beneficiary action. Two cases that disallowed third party suits—*Johnson v. Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States,* 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States,* 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl. 1972), denied a third party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third party beneficiary actions.

the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant airport, had standing to sue as a third party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. §1110(4) [now 49 U.S.C.A.

§1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the

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[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
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> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

[13] *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973).

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. §1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870, 74-3881.

United States Court of Appeals, Fifth Circuit.

Jan. 30, 1976.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after takeoff from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the

passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850,

[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

[5] Ga. Code Ann. § 11-201, *et seq.*

118 S.E.2d 234 (1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, however, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. §23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found

no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. Code, §69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*,

but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King*, 104 Ga. App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of

its discussion of the *Southern Airways* case the court said: "For this purpose, there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

II

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. §23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. §72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a

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[6] *See also, City of Macon v. Powell*, 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

municipality or a county liable for a nuisance, none has cited §72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. §72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that §72-103 does not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, §3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus

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[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

creating an action for compensation under the Constitution, and accordingly, an exception to §23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan*, *McFarland*, or *Nalley*. In those cases land was rendered useless as the incidental result of a public project; the taking was an inevitable result of the public project, and the county knew or should have known that flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga. App. 475, 199 S.E.2d 889 (1973).[11] These cases allow municipalities to be held liable in nuisance despite §69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases

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[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

must be read to be a common law exception to the general statutory rule expressed in §69-301 that municipalities are immune. Such an exception cannot be created for counties, because §23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Appeals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III

[4] Finally, the plaintiffs seek to sue the county as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia

law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by §23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Praytor, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third party beneficiaries are explicitly provided for by Ga. Code Ann. §3-108. ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga.App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance

policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and

that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E.2d 805 (1972). The court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

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[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

IV

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga. 333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party

beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224; *Smith v. United States*, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, §145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third-party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party beneficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont. 1968, 279 F.Supp. 548 (same); *Brotherton v. Merritt-Chapman & Scott Corp.*, 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control

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[3] Restatement of Contracts, §145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assurances required by 49 U.S.C.A. §1110.[5] I can find nothing in the language of the contract or the legislative history of 49 U.S.C.A. §1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra,* it appears that the only purpose of these assurances was to make sure that federal funds were effectively em-

[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

[5] 49 U.S.C.A. §1110 provides in pertinent part:

> As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that
>
> * * * * *
>
> (2) such airport and all facilities thereon or connected therewith will be suitable operated and maintained, with due regard to climatic and flood conditions;
>
> (3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;
>
> * * * * *

ployed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. §1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v. Town of Islip*, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY	CIVIL ACTION NO. C74-24A
vs.	
UNITED STATES OF AMERICA, DEKALB COUNTY, GEORGIA, et al.	

ORDER

This action was brought by Fireman's Fund Insurance Company against the United States of America, DeKalb County, Georgia, and the individual members of the Board of Commissioners of Roads and Revenues of DeKalb County (also referred to as DeKalb County) to recover for the distruction of a Lear Jet aircraft upon which it issued a policy of insurance. Jurisdiction exists as to this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b)[1], and against DeKalb County and the Board

[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

of Commissioners as to this action pursuant to 28 U.S.C. §1332.[2] The case is now before the Court upon the United States's motion to consolidate this action with the case of *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), presently pending in this Court. Also before the Court is DeKalb County's motion to strike portions of the complaint and to dismiss the plaintiff's claims against it. Fed.R.Civ.P. 12(b) and 12(f).

The case arises out of a Lear Jet aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. A short time after the crash there were found the remains of several dead birds near the end of the runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump maintained by defendant DeKalb County. The complaint alleges that the turbine engines of said aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. Plaintiff claims that the United States, through its agency, The Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the DeKalb-Peachtree Airport, in that, such bird hazard had existed for a substantial period. It is urged that the existence of such birds at the county's garbage dump and airport created a substantial hazard to the safe operation of departing and arriving jet turbine aircraft. Based upon these

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states. . . ."

allegations, the plaintiff claims that both the United States and DeKalb County were negligent in the operation and maintenance of the airport. It is further alleged that DeKalb County is liable for the maintenance of a public nuisance and for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.

I. MOTION TO CONSOLIDATE

The defendant United States has moved the Court pursuant to Fed.R.Civ.P. 42(a)[3] to consolidate the instant action with *Miree v. United States*, Civ.No. 19293 (N.D. Ga., filed Nov. 5, 1973), for purposes of discovery and trial on the issue of liability. Both of these cases involve the open garbage dump at the airport, the operation of the airport, certain formal agreements between the United States and DeKalb County concerning the operation of the airport, the bird hazard, and the crash of the Lear Jet on February 26, 1973. The plaintiff makes no objection to the motion to consolidate.[4]

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[3] Fed.R.Civ.P. 42(a) provides:

> "When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[4] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl*, Civ. No. 17968 (N.D. Ga., filed 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Miree v. United States of America*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973) which involves wrongful death claims filed by the children of two passengers aboard the aircraft; (3) *Phillips v.*

Based upon a full consideration of both cases, the Court concludes that it will follow its regular procedure of deferring decision on consolidation for trial purposes until the pretrial conference of this case. In this manner, the Court can more fully grasp the effect of such a ruling and whether it will best serve the convenience of the parties and the Court by eliminating unnecessary repetition. Such a procedure also insures that the rights of the parties will not be prejudiced by a premature order of consolidation. *See generally Dupont v. Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1967), *cert. den.* 386 U.S. 958 (1967). The Court does believe though, that since there are common questions of law and fact involving liability in both cases, and no objection appearing, consolidation will be ordered for purposes of discovery and other pretrial matters.

II. MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS

DeKalb County and the individual defendants have moved to dismiss this action as to them for lack of jurisdiction over their person. The County and the Commissioners claimed that they were not personally served as required by law. *See* Fed.R.Civ.P. 12(b)5. Thereafter plaintiff caused the United States Marshal to serve the complaint and summons personally upon the defendants. The DeKalb County defendants then filed a response (March 12, 1974) to the renewed ser-

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United States of America, Civ. No. 19412 (N.D. Ga., filed Nov. 28, 1973), which involves a wrongful death action by the wife of the co-pilot aboard the aircraft; (4) *William Michael Fields v. United States of America, et al.*, Civ. No. C74-291A (N.D. Ga., Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear Jet; (5) *Chaisson v. Southeast Machinery, Inc.*, Civ. No. 74-915A (N.D. Ga., filed May 10, 1974), which involves damage to the property where the Lear Jet crashed.

vices wherein they admitted that they had been "served as by law provided." Accordingly, the Court finds that the motion to dismiss for insufficient service of process has been rendered moot and is hereby denied.

III. MOTION TO STRIKE

Defendant DeKalb County has moved to strike various paragraphs of plaintiff's complaint for failing to state a claim either in negligence, nuisance, or breach of contract. The Court particularly notes that defendants' motion to strike is based upon the ground that portions of plaintiff's complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f).[5] The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The defendant fails to enumerate these grounds in its motion.[6] The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such. Accordingly, the request to strike is denied.

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[5] See 5 Wright and Miller, Federal Practice and Procedure. § 1380 at 782 (1969) where it is stated: "[Rule 12(f)] is neither an authorized nor a proper way to procure the dismissal of all or part of a complaint. . . ."

[6] DeKalb County's argument, in support of its motion, that paragraphs 65(a) and 65(b) relating to DeKalb County's insurer is without merit. No prejudicial effect appears from a mere allegation of insurance coverage inasmuch as it is not the practice of this court to allow the jury to see the pleadings.

IV. MOTION TO DISMISS

The plaintiff's complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiff's claims.

A. Nuisance

Plaintiff contends that defendants are guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that defendants knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and; that as a result of said nuisance special damage has been sustained by plaintiff. In response to these contentions the defendant urges that Ga. Code §23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority

> can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education For The City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property. In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisions other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *cf. Crowder v. Department of State Parks*, 228 Ga. 436 (1971).

Plaintiff's reliance upon *Nalley v. Carroll County*, 135 Ga. 835 (1911) and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the Constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code §2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code §23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. Breach of Contract

Plaintiff, in its complaint, contends that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiff further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiff was obligated to indemnify its insured for the loss of the aircraft. Based upon these allegations, plaintiff claims it, as assignee of the insured's rights, is a third-party beneficiary to the Grant Agreement and that it may maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a

> tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added).

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiff for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiff can recover as a third-party beneficiary under the contract in question.

C. **Negligence**

The plaintiff's remaining claim against DeKalb County is based upon negligence in the operation and maintenance of the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiff, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961), urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia*

Power Co., 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . . .' On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. *Id.* 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education For The City of Savannah and The County of Chatham*, No. 49044 (Ga. Ct. of App., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). The Georgia courts have consistently held that the county is an "arm of the state." As such it carries the state's burdens and responsibilities within its respective locality. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. It is upon this basis that the differing liabilities are based. While it must be conceded that DeKalb County has, by operating an airport, extended its activities into areas beyond its traditional function, this Court is unable to find that the distinctive classification is unrelated to the purpose of Ga. Code §23-1502 to justify holding DeKalb County liable.

D. **Waiver of Governmental Immunity**

The plaintiff alleges that DeKalb County has purchased liability insurance with respect to property damage claims such as the one presented here. Also

shown is that DeKalb County required that the policy contain a "waiver of governmental immunity clause." In this regard the policy provided:

> It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the state performing governmental function[s].

The plaintiff claims that this affirmative action by DeKalb County constitutes an express or implied waiver of sovereign immunity with respect to property damage claims arising out of the negligent operation of the airport, at least to the extent of the limits of liability. The question as to what extent an otherwise existing governmental immunity is affected by the procurement of insurance was discussed in *Winston v. City of Austell*, 123 Ga.App. 183 (1971). In *Winston* the plaintiff sought damages for the city's alleged negligence and maintenance of a nuisance in the operation of a jail. It was alleged that the city had procured liability insurance which by its terms covered the claim. In response to this allegation the Court found:

> [T]he procurement of liability insurance by the city does not constitute a waiver of the defense of sovereign immunity insofar as this defense bars recovery for damages caused by the performance of a governmental function in a negligent manner.

Id. at 184. This appears to be in accord with the majority view in other jurisdictions. *cf.* Annot., 68 A.L.R. 2d 1438 (1959).

Likewise, in *Ware County v. Carson*, 61 Ga.App. 15 (1939), the plaintiff who was injured while a patient in

a county hospital sought to recover for her injuries. The county had procured a policy of insurance indemnifying it against loss. The Court on a motion to dismiss found that in circumstances where the county is not subject to suit for the injuries complained of, the Court is not authorized to fix the liability of the insurer in a case where the insurer is not a party.

The Court finds both *Winston* and *Ware County* persuasive as to the course it should take in the pending matter. It is for the Georgia legislature to prescribe whether, and under what conditions, one may maintain an action against a county for injury, and the legislature's power in this respect is controlling. Accordingly, the Court is compelled to find that the fact that DeKalb County has obtained a policy of liability insurance does not in itself result in a waiver of governmental immunity.

The Court further finds that the express policy provision waiving immunity does not change this result. By its terms, the contract is one between the assured and the insurance company. There is nothing in the above-quoted provision which was intended to confer a benefit upon the public generally; but rather, was to protect the county against such a defense once a judgment was entered against it.

V. PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM OF THE DEFENDANT UNITED STATES

Defendant United States has filed a counterclaim against the plaintiff alleging that the negligence of plaintiff's insured is imputed to it. Plaintiff has moved to dismiss this allegation for failure to state a claim for relief. Fed.R.Civ.P. 12(b)(6).

The pleadings in this case establish that Fireman's Fund Insurance Company was not responsible for the ownership or operation of the aircraft, nor was it responsible for the crash in question. Nothing is alleged by the United States which could show liability based on respondent superior or any other form of liability with respect to the airplane crash. Fireman's Fund, having paid the insured, is a mere subrogee or assignee of the insured's rights. These facts fail to establish any claim against the plaintiff. Accordingly, plaintiff's motion to dismiss the counterclaim of the United States is granted.

In summary, the Court (1) grants the United States's motion to consolidate this case with *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), for discovery purposes but defers ruling on consolidation for trial purposes until the pretrial hearing of this case, (2) denies DeKalb County's motion to strike portions of plaintiff's complaint, and (3) grants DeKalb County's motion to dismiss plaintiff's complaint as to its claims of negligence, nuisance and for breach of contract, (4) grants the plaintiff's motion to dismiss the counterclaim of defendant United States.

IT IS SO ORDERED this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY

vs.

UNITED STATES OF AMERICA

CIVIL ACTION NO. C74-24A

Filed Sept. 25, 1974

ORDER DENYING MOTION TO SET ASIDE PRIOR ORDER DISMISSING DEKALB COUNTY

This action was brought by Fireman's Fund Insurance Company against the United States of America, DeKalb County, Georgia, and the individual members of the Board of Commissioners of Roads and Revenues of DeKalb County (also referred to as DeKalb County) to recover for the destruction of a Lear jet aircraft upon which it issued a policy of insurance. In a prior order of this court, *Fireman's Fund Insurance Co. v. United States*, Civ. No. C74-24A (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiff's failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on plaintiff's motion for reconsideration of this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by

DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allegations, plaintiff claimed that both the United States and DeKalb County were negligent in the maintenance of a garbage dump near the airport and that piaintiff as a third-party beneficiary may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss, which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the plaintiff, relying upon *Caroway v. City of Atlanta*, 85

Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urges this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although the court sympathizes with plantiff's view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code §69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties. . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital. . . .

Plaintiff further argues that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228

Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974). Although there is some language in *Southern Airways* which supports plaintiff's position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929 (1927), that

> [w]henever a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

Id. at 934.

This court also finds that plaintiff's reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code §2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiff's claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974).

For the foregoing reasons, the plaintiff's motion to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

* * *

FINAL JUDGMENT PURSUANT TO RULE 54(b)

(Number and title omitted)

(Filed Sept. 25, 1974)

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's Office on June 27, 1974 granting the motion of Defendant DeKalb County to dismiss the complaint for failure of plaintiff to state a claim, further, the motion by plaintiff Fireman's Fund Insurance Company to set aside prior order dismissing DeKalb County and the members and chairman of the Board of Commissioners of Roads and Revenues of DeKalb County filed on July 3, 1974, having been denied by Order of the Court dated filed on September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b)

of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint against the plaintiff, it is

ADJUDGED that the action be dismissed as to the Defendants, DEKALB COUNTY, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD, W. M. COLLIDGE, and H. F. MANGET, that the plaintiff, FIREMAN'S FUND INSURANCE COMPANY, take nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

This 25th day of September, 1974.

BEN H. CARTER, Clerk

BY: /s/ DANNY BROWN
DANNY BROWN
Deputy Clerk
U. S. District Court
Northern District of Georgia

Approved and Ordered
filed of record:

S/ W. C. O.
United States District Judge

* * *

AMENDMENT OF FINAL JUDGMENT

(Number and Title Omitted)

(Filed Oct. 2, 1974)

In order to correct a clerical error, and pursuant to Rule 60(a), Fed. R. Civ. P., the final judgment dated and filed on September 25, 1974 in this case is hereby amended by deleting H. F. Manget from the judgment of dismissal, so that as the case now stands H. F. Manget remains as a party defendant.

It is so ordered and adjudged.

This 2nd day of October, 1974.

/s/ WILLIAM C. O'KELLEY

Judge, United States District Judge

* * *

APPENDIX D

United States Court of Appeals

For the Fifth Circuit

October Term, 1975

NO. 74-3870

D. C. Docket No. CA C-74-24-A

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

*Because of illness Judge Wisdom did not participate in the hearing or in the consideration of this case Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on the petition of defendant-appellee, DeKalb County, Georgia, for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed by the Court en banc;

It is further ordered that plaintiff-appellant pay to defendant-appellee, DeKalb County, Georgia, the costs on appeal to be taxed by the Clerk of this Court.

August 25, 1976

TJOFLAT, Circuit Judge, concurring;

MORGAN, Circuit Judge, with whom BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join dissenting;

BROWN, Chief Judge, dissenting.

Issued as Mandate: Sept. 16, 1976